

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>WAYNE HAMILTON</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>RON FOWLES CONSTRUCTION</b>	)	
Respondent	)	Docket No. 1,066,375
	)	
AND	)	
	)	
<b>CINCINNATI INSURANCE COMPANY</b>	)	
Insurance Carrier	)	

**ORDER**

**STATEMENT OF THE CASE**

Respondent and its insurance carrier (respondent) requested review of the January 3, 2014, preliminary hearing Order entered by Administrative Law Judge Rebecca Sanders. Dan M. McCulley of Manhattan, Kansas, appeared for claimant. Christopher J. McCurdy of Overland Park, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found claimant sustained an accident arising out of and in the course of his employment on May 16, 2013. The ALJ determined claimant provided timely and proper notice to respondent on June 3-4, 2013. Additionally, the ALJ found claimant is entitled to medical care and designated Dr. Adam Chase as the authorized treating physician.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the October 23, 2013, Preliminary Hearing and the exhibits; the transcript of the November 1, 2013, deposition of Ron Fowles and the exhibits; the transcript of the November 1, 2013, deposition of Aaron West and the exhibits; the transcript of the November 1, 2013, deposition of Katie Loughmiller; the transcript of the November 1, 2013, deposition of James Steele; the transcript of the November 1, 2013, deposition of Pedro Castro; the transcript of the November 15, 2013, evidentiary deposition of Kim Smerchek and the exhibits; the transcript of the November 15, 2013, evidentiary deposition of Danny Grunewald; and the transcript of the November 15, 2013, evidentiary deposition of Beth Quinn, together with the pleadings contained in the administrative file.

### ISSUES

Respondent argues claimant's claim should be denied regardless of the actual accident date because claimant failed to prove his date of accident, and he failed to provide adequate and timely notice of his injury under K.S.A. 2013 Supp. 44-520(a).

Claimant contends the ALJ's Order should be affirmed with respect to compensability in this claim, but argues the Board should find that adequate, timely notice to his supervisor occurred on the date of the accident.

The issues for the Board's review are:

1. What is claimant's date of accident?
2. Did claimant provide timely and proper notice of an accident?
3. Did claimant's accident arise out of and in the course of his employment with respondent?

### FINDINGS OF FACT

At the time of the preliminary hearing, claimant had been employed by respondent for over four years and held the position of carpenter. Claimant stated respondent typically worked several job sites simultaneously, and he could not specify which he was working on the date of the accident other than it concerned Kansas State University.

Claimant testified he sustained an injury to his right knee on May 16, 2013, while unloading trash from a truck:

I had taken a load of trash to one of our dumpsters on another job site and in the process of trying to lift the trash can onto a cross box on the truck, a side box on the truck, I slipped on some wet plastic, because it was breezy and raining, and fallen back onto the cross box and jammed my – the back of my knee and leg up against the cross box as I fell backwards.<sup>1</sup>

In addition to injuring his knee, claimant “knocked [his] head on the ladder rack” and “landed on [his] butt.”<sup>2</sup> Claimant stated he continued to work the remainder of the day, although he was in pain. He unloaded the material from his truck alone. Claimant testified

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<sup>1</sup> P.H. Trans. at 8.

<sup>2</sup> *Id.* at 10.

he notified Pedro Castro and Bobby Martinez, coworkers, and Danny Grunewald, his supervisor, shortly after he finished unloading the truck.

Mr. Castro testified he recalled claimant saying he had fallen in the truck, but he was unable to remember which day this occurred. Mr. Grunewald testified claimant said he had “hurt [his] knee” and “busted [his] ass,” but did not say where or exactly when.<sup>3</sup> Mr. Grunewald recalled this occurring at least two weeks before June 3, 2013. Mr. Grunewald did not have claimant complete an accident report. Mr. Grunewald stated claimant never asked for medical treatment nor specified which knee was injured. Further, Mr. Grunewald testified claimant never asked to complete an accident report nor indicated he required anything else because of the accident.

Claimant testified he repeatedly mentioned his right knee problems to Mr. Grunewald following the accident:

The following Monday I told him my knee was hurting worse, it was swollen, and I repeatedly for the next several weeks told him at least every other day that I need to get something done about it.<sup>4</sup>

Claimant stated Mr. Grunewald’s response was that he needed to “quit drinking so much Mountain Dew.”<sup>5</sup> Mr. Grunewald agreed claimant had discussed his knee problems, but Mr. Grunewald was under the impression claimant referred to his left knee. Claimant had surgery on his left knee in 2005 and often wore a brace while at work.

On Monday, June 3, 2013, claimant was told by Mr. Grunewald to report to the office on an unrelated matter. When claimant reported to the office to be reassigned to another job, he informed Ron Fowles, owner of respondent, of the injury to his right knee. Mr. Fowles told claimant to go to K+Stat Urgent Care (K+Stat) and have his right knee evaluated by a doctor. Mr. Fowles testified June 3, 2013, was the first day he had notice of claimant’s right knee injury. Claimant did not present at K+Stat on this date.

Claimant met with Aaron West, respondent’s project manager, the following day, June 4, 2013, while Mr. West was walking the job site. Mr. West testified claimant pulled him aside and informed him of the knee injury. Mr. West stated this was the first time he was made aware of the problem, and during the conversation claimant indicated the accident occurred on May 13, 2013. Again claimant was told to go to K+Stat, this time by Mr. West, for evaluation of the right knee.

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<sup>3</sup> Grunewald Depo. at 15.

<sup>4</sup> P.H. Trans. at 12-13.

<sup>5</sup> *Id.* at 13.

Later that day, claimant presented at K+Stat with “right knee pain with swelling and knot behind the knee for 3 weeks.”<sup>6</sup> K+Stat records show claimant’s accident date as May 16, 2013. X-rays of the right knee revealed no acute fracture or abnormality, and claimant was diagnosed with right knee popliteal cyst with knee effusion and advised to apply heat and continue with NSAID medication. He was released to return to work that day. Claimant was also referred to Orthopaedic and Sports Medicine Center for consultation. A “Work Comp Information Sheet,” of unknown origin, regarding the referral lists claimant’s accident date as May 13, 2013.<sup>7</sup>

Respondent submitted this claim to its insurance carrier on June 5, 2013, indicating claimant sustained an accident on May 13, 2013. Kim Smerchek, the insurance adjuster, received a copy of the records from K+Stat and interviewed claimant on June 6, 2013. Ms. Smerchek recorded the following statements during the interview:

Q. Okay. And what time – do you know approximately what time of day the injury took place?

A. Wow, I’m guessing shortly after noon. I’m not certain. I don’t recall for sure.

Q. Okay. What was the date?

A. The 16<sup>th</sup> of – of May.<sup>8</sup>

Ms. Smerchek denied the claim in a letter dated June 7, 2013, because claimant failed to notify his employer within 20 days of May 13, 2013. Respondent indicated to Ms. Smerchek they would provide medical care for claimant although the claim was denied.

Claimant presented at Orthopaedic and Sports Medicine Center on June 19, 2013, with right knee pain. Dr. Adam Chase examined claimant and took his history, which included an accident date of May 16, 2013. Dr. Chase diagnosed claimant with right knee pain and a possible lateral meniscal tear. He recommended claimant undergo an MRI study to further evaluate for meniscal pathology.

An MRI dated July 1, 2013, confirmed a tear of the lateral meniscus, as well as revealed a small tear of the medial meniscus and a large Baker’s cyst. Dr. Chase again examined claimant on July 5, 2013, and discussed treatment options, including steroid injections or arthroscopic surgery. Claimant opted for surgery, which was scheduled for July 15, 2013. Claimant eventually cancelled this surgery when he was informed respondent would no longer pay for his treatment. Claimant does not have health insurance.

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<sup>6</sup> P.H. Trans., Ex. 1 at 47.

<sup>7</sup> *Id.* at 1.

<sup>8</sup> Smerchek Depo. at 27-28 and Ex. 2 at 2.

**PRINCIPLES OF LAW**

K.S.A. 2013 Supp. 44-520, effective April 25, 2013, states:

(a)(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 20 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

(C) if the employee no longer works for the employer against whom benefits are being sought, 10 calendar days after the employee's last day of actual work for the employer.

Notice may be given orally or in writing.

(2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.

(3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.

(4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>9</sup> Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted

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<sup>9</sup> K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, rev. denied 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

by K.S.A. 2012 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.<sup>10</sup>

### ANALYSIS

1. What is claimant's date of accident?

The claimant testified that the date of accident was May 16, 2013. The ALJ found claimant to be credible. The Board generally gives some deference to an ALJ's determination regarding the credibility of witnesses, particularly when the ALJ witnessed the testimony in person.<sup>11</sup>

Claimant told Aaron West on June 4, 2013, he was injured at work and required medical treatment. Mr. West believed claimant told him the injury occurred on May 13, 2013. On the same day Mr. West received notice of the accident, he directed claimant to go to K+Stat for medical treatment. The K+Stat records from June 4, 2013, note an accident date of May 16, 2013.<sup>12</sup>

Claimant's testimony, which is found to be credible, and the initial medical record from K+Stat on June 4, 2013, support the ALJ's finding that claimant suffered an accident on May 16, 2013.

2. Did claimant provide timely and proper notice of an accident?

K.S.A. 2013 Supp. 44-520(a)(1)(A) requires an injured worker to provide notice of an accident within 20 days. As noted above, claimant suffered an injury by accident on May 16, 2013. Ron Fowles testified claimant told him about the injury on June 3, 2013, 18 days after the injury. Aaron West testified claimant gave notice of the accidental injury on June 4, 2013, 19 days after the injury. Notice was provided within 20 calendar days from the date of accident.

3. Did claimant's accident arise out of and in the course of his employment with respondent?

Claimant testified regarding the specific nature of his accidental injury. Pedro Castro testified that, while he could not recall the date, claimant described a slip and fall

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<sup>10</sup> K.S.A. 2012 Supp. 44-555c(k).

<sup>11</sup> See e.g., *Le v. Exacta Aerospace, Inc.*, No. 1,060,178, 2012 WL 6101126 (Kan. WCAB Nov. 27, 2012); *Wood v. Medicalodges, Inc.*, No. 1,051,863, 2011 WL 1747859 (Kan. WCAB Apr. 7, 2011); *Holman v. Epixtar Corp/Nol Group, Inc.*, No. 1,039,925, 2008 WL 4763721 (Kan. WCAB Sept. 30, 2008).

<sup>12</sup> P.H. Trans., Ex. 1 at 47.

injury. Danny Grunewald, claimant's supervisor, testified he did not deny claimant fell and hurt himself.<sup>13</sup> The record supports the ALJ's finding claimant suffered an injury by accident arising out of his employment with respondent.

**CONCLUSION**

Claimant suffered an injury by accident arising out and in the course of his employment with respondent on May 16, 2013. Claimant provided timely and proper notice of an accident pursuant to K.S.A. 2013 Supp. 44-520(a)(1)(A).

**ORDER**

**WHEREFORE**, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Rebecca Sanders dated January 3, 2014, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of March 2014.

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HONORABLE SETH G. VALERIUS  
BOARD MEMBER

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Rebecca Sanders, Administrative Law Judge

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<sup>13</sup> Grunewald Depo. at 21.